No. 183. January Term, 1879.

In the Supreme Court of Pennsylvania

FOR THE EASTERN DISTRICT.

9

MANNERS' APPEAL.

BRIEF OF THE LIBRARY COMPANY OF PHILADELPHIA, APPELLEE.

WM. HENRY RAWLE,
R. C. McMURTRIE.

Allen, Lane & Scott, Printers, 233 South Fifth Street, Philadelphia.

MANNERS

vs.

HENRY J. WILLIAMS AND THE LIBRARY COMPANY OF PHILADELPHIA.

BRIEF OF THE LIBRARY COMPANY, APPELLEE.

On the twelfth page of the record in this case, the appellants, in referring to the decision in the Court below, say:—

"No opinion was read or filed."

And again, on page 39—

"No opinion was filed in the Court below, and it is difficult to imagine reasons where none exist."

Hence one would naturally infer that the decree below was entered *sub silentio*.

But *the fact was* that a careful oral opinion was delivered by the Court (as has been the usage in England for hundreds of years, and is to this day) by the learned President Judge, who delivered the opinion of the whole Court. A dozen newspapers contained a report of it, and the best of them is, perhaps, the following from the *Public Ledger*:—

"THE RUSH WILL CASE—THE NEW LIBRARY.

"In Common Pleas, No. 1, Judge Allison, on Saturday, rendered an opinion in the matter of the bill in equity filed by Robert Manners of London, England, against H. J. Williams, executor of Dr. James Rush, and the Philadelphia Library Company. The bill itself and the argument upon it were fully reported a short time ago, and it is only necessary to say that the plaintiff claimed that the will of Dr. Rush, so far as regarded the residuary estate, was of so contradictory and uncertain a nature, and so impossible of being carried out, as to be void in law. Hence he prayed the court to declare that Dr. Rush died intestate as to the residue of his estate after paying certain legacies and annuities; and to decree that he, said Manners, as a nephew and heir at law of said decedent, should be entitled to his proper share in said estate. To this bill demurrers were filed by both Mr. Williams and the Library Company.

"These demurrers covered all the averments of the complainant, and it was upon them and the bill filed that the decision on Saturday was rendered. President Judge Allison began by saying:—'We do not think any one of the averments in the bill contained that which should allow the case to come to an issue, and there is nothing in the bill which would allow the plaintiff to go into a contest upon the will, and to claim the estate upon the grounds set up.' He then took up the demurrers in detail. The first three grounds he said he would pass over. The fourth, which stated 'that upon the complainant's own showing the allegation of the want of funds wherewith to maintain the library was untrue, because, as shown by the codicil, upon the falling in of certain annuities, an income of $10,400 per annum would be available for the purpose,' was held by Judge Allison to be a complete answer to the averment of the complainant upon this branch of the case.

"As to the fifth averment of the bill, which substantially avers that the following clause of the will—'I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency. Temperate, sincere and intelligent inquiry and discussion are only to be dreaded by the advocates of error'—would be contrary to sound morals and to religion, and to the policy of the law, Judge Allison commented at length. He holds that the demurrer of the Library Company to the effect that the clauses alleged to be contrary to morality are merely directory, and do not compel the purchase or preservation of any book whatever, is sufficient answer to the averment.

"He continued by saying that the complainant urged that the non-exclusion of certain works on politics and theology would be damaging, and the influence of the library containing them would be prejudicial to good morals and the religious sentiment of the community. 'We think, however, the demurrer is well taken. The language of the will is 'my wish,' but even if it were framed in the shape of a direction to the executors to keep in the library certain books contrary to the established views, we think it would be asking a Court to do a great deal to say that a large public library, to which the whole public can go for knowledge, should be restricted upon questions of vast importance to books confined to one side of a question only.

"'The clause of the will gave the executors a discretion to determine the kind of books that should go on the shelves of the library. As long as they excluded indecent and ribald books they were soundly exercising that discretion and complying with the wish of the testator. The Court, in sustaining the other demurrers,

substantially holds that the purchase of the lot at Broad and Christian streets having been made more than a calendar month before the death of the testator, was not void; that the testator died intestate as to no part of his estate, but provided that any surplus after the erection of the buildings, should be expended for books and the maintenance of the library; and that the time had not come for the Philadelphia Library Company to accept or refuse the Ridgway Branch Library; that the executor, in whom the disposition of the property in the event of a refusal rested, not being dead, the heirs could not claim; that even if he were dead, and the Library Company had refused to accept the provisions of the will, the charitable uses by the will declared would be saved by the act of Assembly of 26th of April, 1855, which provided in such cases for the appointment of a trustee to carry out the beneficial intentions of the testator. Demurrer sustained and bill dismissed.'"

Two other reports, slightly differing from the above, are also given.*

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* "In the Court of Common Pleas, in the matter of the bill in equity of Robert Manners *vs.* Henry J. Williams and the Library Company of Philadelphia, Judge Allison rendered a verbal opinion this morning. The matter came up on bill and demurrers. The demurrers were twelve in number. The opinion sustained all of them, saying that the first, second and third did not require notice at the hands of the Court.

"The Court said:—'I do not think any one of the averments in the bill contained that which should allow the case to come to an issue; and there is nothing in the bill which would allow the plaintiff to go into a contest upon the will, and to claim the estate upon the grounds set up in the bill in equity filed.'

"As to the fourth demurrer, which set up that there was no provision for the support of the library, the Court says that that fact is met by the demurrer that states that upon the falling in of certain annuities made by the testator an annual income of $10,400 for the maintenance of the library will be realized, which is a sufficient answer to the averment.

"As to the averment of the bill that the clauses of the will concerning certain books and regulations of the library are impossible of execution, or being carried out, would be contrary to sound morals and religion and

The case was argued on March 28th and 29th.

The first amendment (record, page 81), that there was a present surplus exceeding $100,000, was filed on

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opposed to the policy of the law, the Court holds that the demurrer of the library company to the effect of the clauses alleged to be contrary to morality are merely directory and do not compel the purchase or preservation of any book whatever, is a sufficient answer. The Court goes on to say that the clause of the will was merely the expression of *a wish*, and it was clearly within the discretion of the trustees to decide what kind of books they would have in the library; as long as they do not allow indecent or ribald books to go upon their shelves they are exercising their discretion in a wise way.

"Speaking of the allegation of the plaintiff, that public morals would be subverted by the admission of certain books containing opinions contrary to the generally accepted views upon politics and religion, the court said:—'We think it would be asking a Court to do a great deal to say that a large public library to which the whole public can go for knowledge should be restricted upon questions of vast importance to books confined to one side of a question only.'"—*Evening Telegraph, April 8th, 1878.*

"In Common Pleas, No. 1, on Saturday, Judge Allison rendered a verbal opinion in the matter of the bill in equity of Robert Manners *vs.* Henry J. Williams and the Library Company of Philadelphia. The matter was argued on the bill and demurrers. The Court sustained all the demurrers, of which there were twelve. Judge Allison said he did not think any one of the averments in the bill contained anything which entitled the matter to come to an issue; and there was nothing which would allow the plaintiff to enter into a contest on the will and claim the estate upon the grounds set up in the bill. As to the residue of the estate after building a library, the Court said that the intent of the testator was clear, and that he did not die intestate as to that residue. That he provided for the keeping up of the library for all time, and it was his intent that the residue should be expended for that purpose. Further, that in case the trustee should die, the argument that the purpose of the will would come to naught, was defective, because it was clearly such a case that the courts would see that another trustee was appointed to carry out the beneficial intent of the testator. In regard to the averment that religion and morality would be subverted by carrying out a certain portion of the will, the Court expressed the opinion that the ground of the demurrer was well taken. The language of the will says, '*I wish.*' But even were it in the nature of a binding instruction to keep these books in the library, we think it would be asking the Court a great deal to say that a large public library, to which the whole public can go for knowledge, should be re-

March 28th, after the argument was nearly finished; and the second (record, page 83), that the testator's works were atheistical, on the 5th of April, the day before the decision.

The garbled extracts from the testator's works, printed by the plaintiff as part of his history of the case, on pages 8 and 9, were not before the Court below and form no part of the record.

All the grounds of demurrer can be classed under two heads :—

I. Those which concern the plaintiff and his standing in Court, and

II. Those which concern the relief which he seeks.

I. The plaintiff and his standing in Court.

This includes the demurrers 1, 2, 3, 8, 11, 15 and 16, viz. :—

1. It appears by the complainant's own showing in his said bill that he, the said complainant, is not the sole heir at law of James Rush, the testator in the said bill named, but that there are other heirs at law of the said testator whom the complainant has not made parties to the said bill, nor has he stated any sufficient excuse for their non-joinder.

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stricted upon questions of vast importance to books confined to one side of the question. It was clearly within the discretion of the trustees to decide what books they would have; and so long as they do not allow indecent or ribald books on their shelves they are exercising that discretion in a wise way."—*North American, April 10th, 1878.*

2. By virtue of the act of the General Assembly of this Commonwealth, approved the twenty-sixth day of April, A. D. 1855, the complainant, as an heir at law, has no interest in the estate of the said testator upon the grounds stated in the bill.

3. If the provisions of the testator's will were invalid, as charged by the complainant, any proceedings by reason thereof must be instituted by leave of the Attorney-General of this Commonwealth, according to the said statute in such case provided.

8. If the objects for which said purchase was made were or are void, the property would, under the said statute, become part of the testator's residuary estate, to the exclusion of the complainant.

11. If no disposition were made of the residuary estate not thus expended nor required for paying annuities, yet any such surplus is not vested in the complainant, but remains as a gift to charitable uses, to be applied under the said statute in that behalf provided.

15. The complainant is debarred by his *laches* from controverting the provisions of the said will; and, by reason of lapse of time, no alleged invalidity of the codicils, or any part thereof, can now avoid the will.

16. The complainant, while seeking equity, has not offered to do equity, in this, namely, he has not offered to repay to the executor any moneys, part of the testator's estate bequeathed for the use of this defendant, which the executor may have expended upon the lot of ground now claimed by the complainant.

These may be thus briefly noticed.

1. All through his bill the plaintiff admits that there are other heirs at law. The testator himself mentions four branches (first codicil, sections 15, 16, 17, 18, Record, pages 67, 68), the Rushs, the Clarks, the Manners, and Mrs. Biddle.*

The plaintiff alone filed this bill. Afterwards, by amendment, one of the Misses Rush was allowed to become a plaintiff. But they did not bring themselves within any of the exceptions to the rule that all parties interested in the decree must be made parties in the cause. The prayer was, "that the title to the residue may be declared to be in your orator *according to his share thereof*, under the intestate laws of Pennsylvania," and it is well settled that, "If the parties are very numerous, one has been allowed to sue on behalf of all, *although he could not have sued for his separate share without bringing the others before the Court.*" (Adams on Equity, page *320.) This was not done, nor excuse made for the omission.

2 and 3. Under the act of 1855, the plaintiff, as heir at law, has no interest, and even if his charges were true, the proceedings must, under the statute, be instituted by leave of the Attorney-General.

The plaintiff's object in his bill was to declare an intestacy as to the residue, because—

First.—The disposition thereof was so uncertain as to be incapable of clear meaning; and,

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* These parts of the will have been omitted by the plaintiff, and they are now supplied.

"*Tenth.*—I give and bequeath unto Mary Lee, a domestic in my service, the sum of two hundred dollars, to be paid to her within six months after my decease; and unto Anne Knee, my faithful attendant for some years, an annuity, or yearly sum of two hundred dollars, payable half-yearly, so long as she shall continue single and unmarried. The said legacy to Mary Lee and the annuity to Anne Knee to be paid to them in

Second.—If this were otherwise, it is contrary to religion.

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case they shall respectively remain in my service until the day of my death, and in the service of my executor at the same rate of wages which they receive from me, so long as he may require them to do so.

"*Eleventh.*—I give and bequeath to Mrs. Catharine Souder, widow of Jacob Souder, deceased, an annuity or yearly sum of two hundred dollars, to be paid to her half-yearly, so long as she shall continue a widow.

"*Twelfth.*—I give and bequeath unto Thomas Craven, who has been for many years the faithful agent of my estate, an annuity or yearly sum of six hundred dollars, to be paid to him half-yearly for and during his life.

"*Thirteenth.*—I give and bequeath unto Miss Caroline Little and her sister, Mrs. S. H. Spruill, and to the survivor of them, an annuity or yearly sum of eighteen hundred dollars, to be paid to them and to the survivor of them, so long as they or either of them shall continue unmarried; and if either of them should marry after my death, then the whole of the said annuity shall be paid to the other, so long as she shall continue unmarried, as aforesaid.

"*Fourteenth.*—I give and bequeath unto Miss Mary Ritchie, the sister of Captain Ritchie, U. S. Navy, an annuity or yearly sum of one thousand dollars, to be paid to her half-yearly, so long as she shall remain single and unmarried.

"*Fifteenth.*—I give and bequeath unto each of my nephews and nieces, Benjamin, Maria S., Catharine, and Richard H. Rush, children of my brother the late Richard Rush, an annuity or yearly sum of three hundred and sixty dollars, to be paid half-yearly to each of my said nephews for and during their natural lives, and to each of my said nieces so long as they respectively shall continue single and unmarried without any survivorship. These several annuities, with one of a similar amount which I intended to have given to their brother, the late J. Murray Rush, make together the sum of eighteen hundred dollars per annum, which I designed for the children left by my brother Richard Rush.

"*Sixteenth.*—I give and bequeath unto my niece Mrs. Georgiana Clark, wife of E. A. Clark, Esq., and daughter of my sister, Mrs. Emily Cuthbert, of Lanoraie, Canada East, an annuity or yearly sum of eighteen hundred dollars, to be paid to her half-yearly, so long as she shall continue the wife or widow of her present husband.

"*Seventeenth.*—I give and bequeath unto my nephew Major Robert Manners, and to my niece Julia Manners, children of my sister Mrs. Mary Manners, now residing near Rochester, Kent, England, annuities

As to the first of these contentions, it may be answered that although at common law, an heir at law would, under a bill properly framed, have his standing in Court, yet the act of 26th of April, 1855, section 10 (Purdon, 207, of which the appellants have quoted a part on pages 35–6) declares that—

"No disposition of property hereafter made for any religious, charitable, literary or scientific use shall fail for want of trustee, or by reason of the objects being indefinite, uncertain, or ceasing or depending upon the discretion of a last trustee, or being given in perpetuity or in excess of the annual value hereinbefore limited, but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county, to supply a trustee, and by its decrees to carry into effect the intent

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or yearly sums of nine hundred dollars each, to be paid to my said nephew half-yearly for and during his natural life, and to my niece so long as she shall continue single and unmarried.

"*Eighteenth.*—I give and bequeath unto my niece Julia W. Biddle, wife of Colonel Alexander Biddle, of the city of Philadelphia, and daughter of my late brother Samuel Rush, an annuity of eighteen hundred dollars, to be paid to her half-yearly, so long as she shall continue the wife or widow of her present husband.

"*Nineteenth.*—I give and bequeath my four Ridgway silver dishes to my brother-in-law John J. Ridgway, now residing in Paris.

"*Twentieth.*—I give and bequeath all the personal wearing apparel, watches, jewelry, trinkets, &c., of my late wife and of myself, to my executor, to be disposed of according to verbal directions which I have given him, but without any obligation to account to any person whatever for them or any of them, or for the disposition thereof.

"*Twenty-first.*—As the delays of the law, of the Courts or of the lawyers may prevent me from disposing in my life-time of my share of my brother William Rush's estate, in case I should not have done so in my life-time, I give and devise the whole thereof to my niece Mrs. Georgiana Clark, daughter of my sister Mrs. Emily Cuthbert, her heirs, executors and administrators, as a remuneration for *her* mother's share of *my* mother's estate, of which she was thoughtlessly and ungenerously deprived."

of the donor or testator, so far as the same can be ascertained and carried into effect consistently with law or equity, for which purpose the proceeding shall be instituted by leave of the Attorney-General of the Commonwealth, on the relation of any institution, association or individual desirous of carrying such disposition into effect and willing to become responsible for the costs thereof, subject to an appeal as in other cases in said Courts respectively, and to be reviewed, reversed, affirmed or modified by the Supreme Court of this State; but if the objects of the trust be not ascertainable, or have ceased to exist or such disposition to be in excess of the annual value permitted by law, or in perpetuity such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to have been made subject to be further regulated and disposed of by the legislature of this Commonwealth in manner as nearly in conformity with the extent of the donor or testator and the rules of law against perpetuities as practicable, or otherwise to accrue to the public treasury for the public use."

It is submitted that the Attorney-General may be safely left to attend to his business if the devisees are guilty.

The second of the contentions (that the devise is void as being opposed to religion) is subsequently considered under another branch of this argument (*infra*, page 36).

8. If the object for which the testator purchased the lot were void, the property would, under the statute, become part of the residuary estate, to the exclusion of the complainant.

That is to say, supposing the purchase of the lot was, as is contended, "a conveyance in trust for charitable

uses," within the eleventh section of the statute, yet the latter declares that

"All disposition of property contrary hereto shall be void, and go to the *residuary legatee or devisee*, next of kin or heirs, according to law."

And it is obvious that if there be a residuary devisee, the next of kin or heirs cannot take. In his very last codicil, the testator speaks of "the motives which induced me to choose the Library Company as *the heir to my estate*" (record, page 73), showing that it was not his design to die intestate as to anything.

11. Even if no disposition were made of the residuary estate, yet any surplus would not go to the plaintiff, but would remain as a gift to charitable uses, to be applied under the statute.

This was settled in the case of the City *vs.* Girard's heirs, 9 Wright, 9. It was there argued that Mr. Girard never contemplated that his college would absorb all the income, and that there being a large surplus, it went to the heirs, and so the Court below decided; but this was reversed on writ of error. And if it be said that that case was decided apart from the act of 1855, yet that statute is express as to the duty of the courts and the legislature, and provides the machinery necessary for the purpose. (See the statute, *supra*, page 10).

15. The plaintiff is debarred by *laches*, and, by reason of lapse of time, no alleged invalidity of the codicils can now avoid the will.

The testator died May 26th, 1869, and the will and codicils were proved May 31st, 1869. This bill was filed February 15th, 1878.

The act of 22d April, 1856, section 7 (Purdon, 408), declares:—

"The probate by the register of the proper county of any will devising real estate, shall be conclusive as to such realty, unless within five years from the date of such

probate those interested to controvert it shall, by *caveat* and action at law duly pursued, contest the validity of such will as to such realty."

By the common law, the admission of a will to probate was conclusive as to *personalty;* that is to say, as to the *factum* of the instrument. All such questions as—

1. Whether it had been revoked,

2. Whether a particular clause was or was not part of the instrument,

3. Whether a codicil was intended as a republication or as a new will,

are questions for the court of probate, and for it alone. Its decision, establishing the *factum*, closes such questions as to personalty against all the world; 1 Williams on Executors, 405, *et seq.*

It was otherwise as to *realty*, and to remedy the mischief arising from the leaving open of such questions indefinitely, our act of 1856 has put realty on the same footing as personalty.

Hence the testator's will, *qua* will, is conclusive both as to realty and personalty, so far as all such questions are concerned; and if the plaintiff should now produce a will leaving all the estate to him, he would have no standing in our courts. So, if he should contend, not merely that the codicil varies the will, but that it revokes it, so as to make it inoperative, he, equally, would have no standing. That question should have been litigated within the five years—after that time, nothing remains but questions of construction.

That is to say, we do not mean to contend that the statute (which is one of limitation) prevents a contest at this day as to the *effect* of the will, either as to its meaning, or as to any of its provisions being void for illegality.

What we do urge is, that inasmuch as the papers which were admitted to probate form together the will, each equally with the others a part of it, and all to be read together as a whole will, the time for saying that one of these papers has revoked the other has passed, and nothing remains but the question, what is the effect of these papers?

There being then, confessedly, a valid will by which the Library Company is the residuary devisee, if the codicil revokes at all, it revokes only by substitution—by variation—by change of the mode of enjoyment—and up to the point where this fails to be shown, the original will stands undisturbed.

1 Jarman on Wills, 159.

Lemage *vs.* Goodban, Law Rep., 1 Prob. and Divorce, 57.

In re Goods of Petchell, 3 *id.*, 153.

1 Williams on Executors, 185.

16. The plaintiff seeks equity without offering to do equity, viz., without repaying any of the money which may have been expended in building a library on the lot he now claims.

Nothing in the record shows whether anything has or has not been spent in the building. But if the executor has, during the nine years in which the plaintiff has lain by, spent, as directed, the larger part of the estate in so building, of course the claim for the lot will include the building. The residuary devisee would lose not only the lot but the money spent on it. It is so contrary to equity that the plaintiff should recover the one without making good the loss of the other, that the question will hardly bear argument.

So much for the grounds of demurrer which concern the plaintiff and his standing in Court.

Next,

II. Those which concern the relief which he seeks.

This includes the demurrers 4, 5, 6, 7, 9, 10, 12, 13 and 14, viz.:—

4. Upon the complainant's own showing, the allegation of the want of funds wherewith to maintain the library in the said will mentioned is untrue in this, that by the very codicil relied on in the bill, the testator expressly dedicates for such purpose a fund of sufficient amount to secure certain annuities, whose aggregate is ten thousand six hundred and forty dollars per annum.

5. The clauses of the said will, alleged to be contrary to morality are merely directory, and do not compel the purchase or preservation of any book whatever; nor can it be assumed that it was the intention of the testator to preserve illegal publications, and the purchasing of none other can be held to be a violation of law.

6. If, as alleged in the bill, certain parts of the said testator's scheme for a library are impracticable or illegal, this will not defeat the scheme as a whole, but the same will be carried into effect in manner as nearly in conformity with the intent of the testator as practicable, according to the provisions of the said statute in such case provided.

7. If, as alleged in the bill, the testator purchased the said lot of ground, situate at the corner of Broad and Christian streets, within one calendar month prior to his death, yet this purchase was not such a conveyance in trust for charitable uses as is void by reason of the provisions of the said statute in that behalf provided.

9. The additional directions contained in the last codicil as to the management of the library after acceptance,

did not, as alleged in the bill, revoke the prior provisions of the will as to the disposition thereof in case of non-acceptance.

10. The testator having, by his will, devised his whole estate in trust for the uses of a library, any subsequent direction to expend any part thereof in the purchase and improvement of a lot for the same did not operate as a revocation of the previous gift; nor could the failure or omission by the executor to expend the whole remainder of the estate in such purchase and improvement, being a matter over which the beneficiary had no control, divest the estate, or any part thereof, so as aforesaid devised.

12. It is not alleged in the said bill that the time has yet arrived for this defendant to elect to accept or refuse the trusts in the said bill contained, and the averments therein as to the refusal, incapacity or failure of this defendant so to accept are too uncertain and inconsistent to require answer thereto.

13. It appears, by the complainant's own showing, that the person is still living whose discretion is alleged to be necessary to execute the trusts in the said bill contained.

14. The trusts defined by the will are sufficiently certain to be carried into effect after the selection of the lot referred to, without requiring the personal direction of the executor, defendant herein, and moreover, in case of the death of the latter, certain other persons are, by the said will, nominated and appointed by the said testator to be executors in his place and stead.

For the sake of convenience the fifth ground of demurrer will be last considered.

4. On plaintiff's own showing, his allegation of want of funds to sustain the library is untrue, as by the very codicil he relies on, the testator gives annuities of $10,400 a year, and the annuity-fund is given to the Library as these fall in.

These annuities are (see *supra*, page 8 *n.*) :—

Anne Knee	$200	a year.
Mrs. Catherine Souder	200	"
Thomas Craven	600	"
Miss Little and Mrs. Spruill, and the survivor	1,800	"
Miss Ritchie	1,000	"
Benjamin Rush	300	"
Maria Rush	300	"
S. Catherine Rush	300	"
Richard H. Rush	300	"
Mrs. Clark	1,800	"
Robert Manners	900	"
Julia Manners	900	"
Mrs. Biddle	1,800	"
	$10,400	

Of these annuities, those to Benjamin Rush and Robert and Julia Manners were revoked by the last codicil, dated 12th April, 1869.*

* This codicil is also omitted by the plaintiffs, and is here supplied.

"I, James Rush, do make this codicil to my last will and testament. For strong and sufficient reasons I hereby absolutely revoke all legacies, annuities and bequests given in my will and testament, or in any codicil thereto, unto Benjamin Rush, son of my brother, Richard Rush, and Robert and Julia Manners, children of my sister, Mary Manners.

"JAMES RUSH.

"Witness my hand and seal this twelfth day of April, A. D. 1869."

If the bill meant to allege that the Library Company had no funds of its own, this should have been averred in the bill, and can not now be assumed to sustain the point made, as it is essential to that point. Moreover, the testator himself (first codicil, clause IV., record, page 65) expressly refers to the funds of the Library Company.

That the plaintiff is concluded by this is evident, as the will itself declares that the fund thus set apart for annuities is sufficient to support the library when built.

Moreover, the chief object of the devise was not to found a new charity, but to enlarge the scope of one already in existence.

6. Even if parts of the testator's schemes are impracticable, this will not defeat the scheme as a whole.

This was settled by this Court under Girard's will in The City *vs.* Girard's Heirs, 9 Wright, 9, where it was said :—

" Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable; but this does not annul the gift. The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity. For equity will substitute another mode, so that the substituted intention shall not depend on the insufficiency of the normal intention * * * * and this is the doctrine of *cy pres*, so far as it has been expressly adopted by us. * * The meaning of the doctrine, as received by us, is that when a definite function or duty is to be performed, and it can not be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close *approximation* to that scheme as reasonably practicable; and so, of course, it must be enforced."

7. If the testator purchased the lot within a month of his death, yet this was not a conveyance in trust for charitable uses within the statute.

The statement of the bill as to this is peculiarly evasive.

It is thus :—

"That within one calendar month prior to his decease, the said Dr. James Rush purchased a lot of ground, situate on the south-east corner of Broad and Christian streets, in the city of Philadelphia, which said lot was purchased by him, and was subsequently conveyed for a charitable use, as set forth in the trusts and conditions contained in the aforesaid writings, alleged to be his last will and codicils."

It is not stated how the lot was so purchased and conveyed—whether it was conveyed *by* him, or conveyed *to* him—*when* it was conveyed for a charitable use, or by whom, or in what manner. Yet all this evasiveness, ambiguity, want of certainty and double intendment is claimed by the plaintiff to be cured by demurrer.

But the law always has been that, on special demurrer, these defects are fatal. A principal rule in Stephen on Pleading is rule 11 of section V. (page 378) :—

"Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading."

And the authorities cited in support of this are headed by the third of Bacon's maxims :—

"You shall find that in all imperfections of pleadings, whether it be in ambiguity of words and double intendments, or want of certainty and averments, or impropriety of words, or repugnance and absurdity of words; ever the plea shall be strictly and strongly taken against him that pleads."

And this is followed by a cloud of authorities.

But apart from this, every line in the testator's will and codicils about the charity he wished to endow was written years before his death—the greater part of it nine years before. The purchase of the lot was a mere change of investment. But for the purchase, the money which bought the lot would have gone, as part of the residue, to the Library Company. Neither money nor lot was "bequeathed, devised or conveyed in trust for religious or charitable uses" within one month prior to the death.

The effect of the appellant's contention would lead to the monstrous result that after a testator should have devised his estate to a charity, any change of investment made thirty days before his death would invalidate the prior devise. The paralysis which a dread of this would produce in the management of his estate may be well imagined. The fact as alleged in the bill is untrue, but as it is thus immaterial, the defendants were willing to rest their case upon the allegation as made.

This Supreme Court has said as to this very lot that the *executor* purchased the lot "in the exercise of *his own* deliberate judgment," the testator having himself designedly refused to run the risk of making "a new will, *lest his death within thirty days afterwards might avoid it.*" Page 279 of the opinion of the court in Williams *vs.* Library Company, 23 P. F. Smith.

And, lastly, the statute being a restriction of the power of devise, the case must be brought strictly within it.

In Schultz's Appeal, 30 P. F. Smith, 396, the testator devised his estate unconditionally to an individual, with the very intent to evade the statute, and it was held that, the devisee not being a party to the fraud, the estate vested in him, and the case was not within the statute, though he designed to carry out the testator's verbal directions—"the bequest was not *within the words* of the statute."

9. The additional directions in the last codicil as to the management of the library did not revoke the prior bequests.

The "additional directions in the last codicil" were, first, an authority to spend all the estate, except a certain reserve fund, in the erection of the library and book-cases; and second, to publish editions of the testator's works.

It is difficult to see how either of these is a revocation of the will.

But the first clause of these "additional directions" is capable of a misconstruction which a few words can set right.

The clause is as follows:—

"I have given and devised the greater part of my estate to my executor for the purpose of erecting for the Library Company of Philadelphia a building not only large enough to contain their present books, but also their probable increase for many years to come. Now, as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate (not a competing) increase of the library and their current expenses (not to be so large as to invite extravagance and waste), for which purposes the sums to be set apart to secure the legacies and annuities given by my said will and testament will be sufficient, I hereby authorize and direct my said executor to expend the whole remainder of my estate in the purchase of a lot and the erection of the Library building, construction of book-cases, &c., leaving the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution."

Now as to this—

1. If, indeed, the testator thought only of that particular institution, "The Library Company of Philadelphia,"

as to which he knew, first, that they already had a library, and second, that they had funds of their own—then the clause in question might possibly require a strict construction which would compel the sacrifice of the secondary intent in order that the primary intent might be supported.

But there is no necessity for this, for—

2. The testator also viewed the contingency that the Library Company might *not* accept, and he guarded against this by providing for another and a separate institution, "The Ridgway Library," and the clause in question must be considered as applicable also to this contingency. He starts the clause, therefore, by his express desire that the devisee *shall* have an income sufficient to provide for the legitimate increase of the library and current expenses; such is the only construction of the words he uses:—

"Now as I do not desire that the Library Company shall have an income greater than is required to provide for the legitimate increase of the library and their current expenses."

The idea is repeated in the closing lines of the clause:—

"Leaving [that is to say, "so as to leave"] the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution."

This, which is perfect sense, is sought to be reduced to nonsense by a strict construction of the phrase which comes between, and which, it must be borne in mind, contains not words of devise, but mere words of expression of opinion, viz.:—

"For which purposes the sums to be set apart to secure the legacies and annuities given by my said last will and testament will be sufficient."

Now, unless it is contended that the testator supposed that all the annuitants would die immediately (an absurdity which is out of the question), these words must be read in connection with those which precede and follow it, and the result is the following harmonious and and sensible interpretation of the whole :—

I. I desire that the devisee shall have an income large enough to provide for the legitimate increase of the library and their current expenses, and no larger ;

II. My executor will doubtless set apart a sum sufficient to secure the annuities and provide for this legitimate increase and current expenses ;

III. I authorize and direct him to expend the whole remainder of my estate in the purchase of a lot and the erection of the library building, construction of bookcases, &c. ;

IV. So as to leave the said company only an income sufficient to defray the ordinary and strictly appropriate expenses of such an institution.

What are these " ordinary and strictly appropriate expenses of such an institutiion " ?

He tells us himself what they *are*, and what they *are not*. They are—

" The legitimate increase of the library and their current expenses." (Codicil, Record page 72.) Every one knows what those are.

All beyond these he intended to exclude. He says in the next clause—

" I have observed that large annual incomes in corporate bodies almost always lead to wasteful extravagances, and cause the institution to become the prey of

schemers, who, under the specious cloak of liberality, or of being what is called public-spirited citizens, have no hesitation in spending the money of the people in order to gratify their own vanity or to promote their own private interests. * * * * As a condition, therefore, of my will, let the managers and contributors join to exclude all such persons from the direction of the Library Company. It is for the quiet, unostentatious and disinterested character of the directors and of their management that I have drawn the motives which induced me to choose the Philadelphia Library Company as the heir to my estate."

So much for the natural meaning of the words.

Now upon the question of judicial construction—of legal interpretation—the law is clear. It is settled that a codicil is never to be taken as revoking a will, unless—

1. It contain express words of revocation, or,

2. Its provisions are so repugnant to the will that the two cannot stand together.

Of these, only the second need be considered.

"Where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original to devise. The law thus laid down has been recognized and acted upon as an established rule in numerous subsequent cases;"

1 Williams on Executors, 185 (7th edition), and notes.

An analogy may be found in the rules of construction of statutes. A statute and its supplement are taken as one statute, just as a will and its codicil are taken as one

instrument. The provisions of both are, if possible, to be harmoniously construed, and a repeal by implication is invariably struggled against by the courts. For this it would be superfluous to cite authority.

It remains only to observe that there are reasons why the English cases should favor the heir at law, which do not exist here. "They owe their origin," said Taney, Ch. J., in Bosley *vs.* Bosley, 14 Howard, 397, "to the principles of the feudal system, which always favored the heir at law, because it was its policy to perpetuate large estates in the same family. * * * * It has not been the disposition of courts of justice, in modern times, to extend the application of these rigid technical rules, but rather to carry out the intention of the testator, where no fixed rule of legal interpretation stands in the way. And this is, or ought to be, more especially the case in this country."

But even suppose, upon the plaintiff's contention, that the income left *was* insufficient, this does not avoid the gift, nor revoke the will. There is nothing either illegal or absurd about it. Suppose several testators should agree, one to leave to a library a building fund, another a fund for current expenses, and another a fund for future increase, could the heirs at law of the first recover the estate, because *his* testator had not also left an income to support the institution? Force of example is as great in charity as in other things of life, and many a testator has bequeathed just enough to start a charity, or to build its foundations, leaving his work as an example to others. And it is by such force of example that many of the greatest charities in the world are such as they are.

10. The testator having devised all his estate for a library, a subsequent direction to purchase a lot for it

did not revoke the gift, nor did any failure of the executor to expend all the estate in building, divest the estate devised; this being a matter over which the library itself had no control.

This Court has decided that under this will the Library Company had, and has, no voice whatever, nor any standing in Court, to restrain or affect any act of the executor as to their building (Williams' Appeal, 23 P. F. Smith, 249), and hence that if he should *bona fide* locate it in any part of the city, however inconvenient or even ruinous, they could not be heard in opposition. Nor, of course, could they control him as to how much he should or should not spend on the building. This being so, the plaintiff's contention comes to this—that if the executor should by economy save a surplus after the building is finished, this act of saving forfeits the charity to the beneficiary, though the latter has had no voice in the matter. It is difficult to answer such a proposition.

12. The bill does not allege that the time has yet arrived for the Library Company to accept or refuse the trusts under the will, and the averments as to this are uncertain and inconsistent.

The averment in the bill (record, page 46) is:—

"The Library Company of Philadelphia have not finally accepted the devise contained in said alleged will and codicils, and have declined to accept the same upon the trusts and conditions in said writings mentioned. And your orator charges that the said The Library Company of Philadelphia have now no power to accept the devise contained in said alleged will and codicils, and that were it otherwise, they are incompetent in law to act as trustees under said alleged will and codicils."

That is to say, the company—

1. Has not finally accepted,

2. Has declined to accept,

3. Has no power to accept, and

4. Is incompetent in law to act as trustee.

But for aught that appears in the bill, there is nothing anywhere to show that the testator has done anything beyond prove the will—no averment that a single stone of the library building has been laid.

And as the will says:—

"And upon this further trust, as soon as the building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto the Library Company of Philadelphia and their successors, for the uses and purposes of their library."

It is obvious that until the first trust, that of building, shall be completed, the second trust, that of conveying, cannot arise.

But if the company has *declined* to accept, why make it a party?

It cannot help the plaintiff, though it may require the executor to found a new library with the building and annuity fund, which the testator intended should take, in case of such declination. (See the first codicil, record, page 66.)

As to the averments that the company
Has no power to accept, and
Is incompetent in law to act,

On the 23d of February, 1870, there was approved the following act of the legislature:—

"That the Library Company of Philadelphia be and they are hereby authorized to act as trustees for the Ridgway Branch of the Philadelphia Library and the

trusts pertaining thereto, under the last will and codicils of James Rush, late of the city of Philadelphia, doctor of medicine, upon the conditions and provisions therein contained, without limitation as to the yearly value or income of the said trust estate, but in such manner that the real and personal property of the company, including such books, pictures, statues and other works of literature and art as now are or shall hereafter be held by them in their own right or on any other or different trusts, shall be in no wise affected thereby, but shall remain and be under their own entire and exclusive control and disposition; and the said company are hereby empowered, after acceptance of this act by the members of the said company, to apply from time to time to the Court of Common Pleas for the City and County of Philadelphia for such further amendments to the charter of the company as may be necessary to carry into effect the conditions and provisions of the said will and codicils in accordance with the directions of this act."

An almost similar act was passed in 1832, allowing the city of Philadelphia to act as trustee under Girard's will, and was cited in answer to the argument that it had no power.

The Supreme Court of the United States said:—

"It is true that this is not a judicial decision, and entitled to full weight and confidence as such. But it is a legislative exposition and confirmation of the competency of the corporation to take the property and execute the trust; and if those trusts were valid in point of law, the legislature would be estopped thereafter to contest the competency of the corporation to take the property and execute the trusts, either upon a *quo warranto* or any other proceeding by which it should seek to divest the property and invest other trustees with the execution of the trusts upon the ground of any

supposed incompetency of the corporation, and if the trusts were in themselves valid in point of law it is plain that neither the heirs of the testator, nor any other private persons could have any right to inquire into or contest the right of the corporation to take the property, or to execute the trusts, but this right would exclusively belong to the state in its sovereign capacity, and in its sole discretion to inquire into and contest the same by a quo warranto, or other proper judicial proceeding. In this view of the matter the recognition and confirmation of the devises and trusts of the will by the legislature are of the highest importance and potency."

Vidal *vs.* Girard, 2 Howard, 127, 191.

Now, are the averments in the bill statements of facts or of conclusions of law?

The capacity of a corporation to do and act is, generally at least, a question of law. There is nothing upon this record from which any incapacity can be inferred, nor any fact stated or reason given from which the inference can be drawn.

On the contrary, it clearly appears on the face of the record that there is an existing corporation now maintaining a library, and of course competent to accept an additional building for its own and additional books.

13. It appears by plaintiff's own showing that the executor, whose discretion is involved, is still living, and,

14. The trusts are sufficiently certain to be carried out without the executor's prescribed discretion, and the testator has himself appointed successors in place of the executor.

The trust to select the site and build was the only one requiring personal discretion within a generation. And

to secure this, the testator nominated two executors to succeed the executor after his death. (First codicil, record page 71.) It is difficult to answer the contention that the estate goes to the heir at law, because the executor's "personal care, skill, taste, judgment and discretion" are alleged to be necessary to carry out, for all future generations, the testator's wishes as to the future management of the charity. To state such a proposition is to refute it.

But the case comes expressly within the statute of 1855, which declares that no disposition of property for charitable uses shall fail by reason of the objects depending upon the discretion of a last trustee,* in which case the Court's discretion is substituted for his.

Nor, apart from the act of 1855, is there any such trust as would fail for want of a trustee, for the same rule must then apply to a gift to an executor to purchase a dwelling for a testator's daughter.

5. The parts of the will alleged to be contrary to morality are merely directory, and do not compel the purchase or keeping of any book whatever; nor can it be assumed that the testator meant to preserve illegal publications, and the purchasing of none other can be held to be a violation of law.

In the first codicil, clause V. (record page 19) the testator said:—"I do not wish that any work should be excluded from the library on account of its difference

* The act is misprinted in two editions of Purdon and in the appellant's paper-book (page 35); and the latter italicizes what he considers the mistake, "depending on the direction of a [*lost ?*] trustee," and the profession has sometimes amused itself as to this at the expense of the legislature. But a reference to the statutes at large (Pamphlet Laws, page 331) will show that the word is "last" and not "lost." And even were it "lost," the meaning would be perfectly intelligible if the word were used in the sense in which we speak of "lost at sea;" "I lost my child," &c.

from the ordinary or conventional opinions on the subjects of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency. Temperate, sincere and intelligent inquiry and discussion are only to be dreaded by the advocates of error. The truth need not fear them."

And in the "additional codicil," clause III. (record page 74) he said :—

"I have given the copyright of all my works to the Library Company, and I will and direct that they shall, for the next half century, publish every ten years and earlier and oftener, if called for, an edition of five hundred copies of any or all of them, so that they shall always have on hand a number sufficient to supply any demand which may be made for any or either of them at a price not exceeding the cost of publication. I leave additions and corrections in the printer's copies preparatory to a subsequent edition, which I imperatively require to be published exactly as they are left. The original parts of them have been written without assistance, and I wish to be alone responsible for all the faults of thought, division, definition and style and of my corrected orthography, as I consider it."

Only the first of these clauses was objected to in the bill as filed, where it was said that—

"The execution thereof would be contrary to sound morals and to religion, and would be opposed to the policy of the law." (Record, page 45.)

And further, that

"A library thus conducted, with the admission of such works thus commended and required, would, as your orators aver and believe, speedily become a fountain for the corruption of pure religion, sound morals, and good order."

So stood the record as the case was presented below and as it was argued. On the day before the decision

an amendment appears to have been filed, in which the plaintiff charged that the works which the testator ordered to be published contained infidel statements, whose publication would be contrary to morals and to law. (Record, page 21.) And upon the faith of this the plaintiff now avers in his argument:—

"The case comes before this Court, *as it did before the Common Pleas*, with a plain admission by the defendants, in their demurrer, of the character of the works of the testator which he directed to be published."

But this is not correctly stated. No demurrer was ever filed to such a statement. Within the rules of the Court below and of this Court no such averment was before the Court at all. The five facts, of which four appear upon the record, are—

On the 15th of February, 1878, the bill was filed. (Record, page 2.)

On the 5th of March, these demurrers were filed. (Record, page 2.)

On the 27th and 28th of March the case was argued.

On the 5th of April this amendment to the bill was filed, record, pages 3, 7 and 8), and

On the 6th of April the demurrers were sustained. (Record, page 3.)

Giving to this amendment its utmost weight, it can not be truthfully alleged—

1. That its averments were admitted by demurrers which were filed a month before, or

2. That "the case came before the Court" upon such admission.

The truth, in fact and in law, was and is, that this injected amendment was never before the Court at all.

As matter of fact, it is obvious that a statement of fact alleged to be made on the 5th of April cannot be covered by the admission of another and a different fact on the previous 5th of March.

As matter of law, inasmuch as the plaintiff seeks to reverse the Court below by reason of matters which were not truthfully before it, the defendant claims the protection of the rules of Court in that behalf, by which it will be seen that after demurrer a plaintiff shall not be permitted to amend his bill, except upon express leave of the Court, upon cause shown.*

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* The following rules originally formed part of what are known as Lord Lyndhurst's rules. In 1842, they were substantially adopted by the Supreme Court of the United States, and, in 1844, by the Supreme Court of Pennsylvania for itself and the Courts of Common Pleas throughout the State, and in 1865 they were revised.

The following are the rules as to amendments :—

"The plaintiff shall be at liberty, as a matter of course, to amend his bill in any matters whatsoever, before answer, plea or demurrer to the bill, but he shall, without delay, give the defendant notice of such amendment, and all rules taken by the plaintiff in the case shall be suspended until such notice is given.

"After an answer or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any law judge of the Court to amend his bill within twenty days thereafter. But after the replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except *upon an order* of a law judge of the Court, *upon motion* or petition, *after due notice* to the other party, and *upon proof* by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiffs submitting to such other terms as may be imposed by the judge for speeding the cause.

"If the plaintiff, so obtaining any order to amend his bill after answer or plea *or demurrer*, or after replication, shall not file his amendments, or amended bill, as the case may require, in the prothonotary's office, and serve a copy on the counsel of all other parties to the cause, who appear by counsel *within the time appointed* for making such amendments, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment has been made."

Equity Rules, rule X., § 49, 50.

If a plaintiff can ignore these rules, and file any amendment, without notice and without leave, the day before the opinion is delivered, he can do so while the opinion is actually being delivered.

Yet it is actually claimed in the ninth assignment of error (record, page 13) that the Court erred in not deciding that as the bill *and amendment* distinctly averred that the testator's works were atheistical, "*and as the demurrer admitted to be true the matters of fact there alleged*," the trust for publishing these works was invalid.

If the averment were material, it would doubtless be allowed even by this Court, upon cause shown, and the rights of the defendants would be protected by a proper order. But this is very different from interjecting the statement without leave or notice, and then seeking to reverse the Court below for not treating it as an admitted fact.

On the argument of the cause, something was said verbally to the effect that the testator's works were atheistical, and a few sentences were read from one of them, to which the defendants answered :—

1. The books were not before the Court; the bill did not refer to them, and on demurrer, the Court could not go beyond the bill. (It was doubtless to meet this argument that the device of amending the bill was adopted.)

2. That if a plaintiff relies on matter that is atheistical, unsound or otherwise unlawful, he should distinctly charge the illegality specifically and put it in issue, so that the defendant may know what he has to meet.

Tried by this rule, the amendment, even if well filed, must fail, as it deals only in widest generalities.

Has it ever been heard of as matter of pleading that a court is asked to decide upon the effect and meaning of a document not brought before them? If this were the case of a deed or will under which the defendant claimed title, and the bill alleged that the instrument created an estate which was illegal, and asked the court to determine that point, would not the ground of demurrer be good, that the plaintiff had not shown what the estate was, nor set forth the document from which it could be gathered? How much more if, as here, the ground of forfeiture is the duty to print and publish certain books. Must not the plaintiffs show upon the record what are the things which are so illegal as to avoid the gift?

And even if otherwise, there still recurs the question whether the supposed illegality is so connected with the gift as an essential element that the gift must fail if it cannot or ought not to be performed.

And this brings the case down to the last question, Is the will avoided by reason of the testator's wishes as to the books in the library?

These are—

"I do not wish that any work should be excluded from the library on account of its difference from the ordinary or conventional opinion on the subject of science, government, theology, morals or medicine, provided it contains neither ribaldry nor indecency. Temperate, sincere and intelligent inquiry and discussion are only to be dreaded by the advocates of error. The truth need not fear them." (Record, page 65.)

And, first, here is, as the Court below said, no binding direction—merely the expression of a *wish*.

The language of the bill (record, page 50), "works thus *commanded and required*," is wholly inaccurate. There is no command. The words are, "I do not *wish* that any work should be excluded," &c. And whatever may formerly have been the law as to precatory trusts (of which a review will be found in the notes to Harding *vs.* Glyn, 2 Leading Cases in Equity [4th edition], part II., page 946), it has long been settled in Pennsylvania that no trust can be established by the use of mere words of desire. The latest case is Paisley's Appeal, 20 P. F. Smith, 158.

In order that the plaintiff should sustain this part of his contention, he must show that the testator's directions to violate the law are so plain that nothing but such violation would be within the terms of the trust.

But suppose the testator's words *were* conditions—and suppose that the character of the books in the Library was his primary and not his secondary intent, is it true, as the bill avers, that a library with such works as he refers to "would speedily become a fountain for the corruption of pure religion, sound morals and good order"?

"Conventional" is defined to mean, "sanctioned by general concurrence—tacitly understood—customary—formal;" (see the various dictionaries.)

What are "ordinary or conventional opinions" on the subjects of Science, Medicine and Government?

The testator was himself a man of science. He says modestly in his will (Record, page 63), "My property has enabled me to devote, happily and undisturbed, the latter part of my life to pursuits of scientific inquiry, which I have deemed to be more beneficial than the mere common enjoyment of an ample fortune;" and he added that one of his objects for the endowment of the library was to express his respect and affection for those

from whom the fortune came, "by erecting to their memories a monument which I hope will prove more durable than any other grateful record I could make, and infinitely more useful to the community."

As to Science and Medicine, he knew the opinions which Plato's school had made "conventional" for centuries; how arithmetic was prized only as serving to raise the mind to the contemplation of pure truth and was thought degraded if applied to the ordinary uses of life; how the object of geometry was to discipline the mind, and not to minister to usefulness; how the science of mechanics was long deemed unworthy the attention of a philosopher, Archimedes himself speaking slightingly of his own inventions; how the use of astronomy was to ennoble the intellect, and not to enable the sailor to steer his vessel; how alphabetical writing ruined the human memory and should be discouraged; how life protracted by medical skill was a long death, and the sooner all sick people died the better for the State; how under this chilling philosophy science made no advance for nearly two thousand years; how later, and after Christianity had been taught for more than fifteen hundred years, Galileo, at the age of seventy, was forced to abjure his theory of the revolution of the earth as "false and contrary to holy Scripture," and gave in his adhesion to the "conventional" opinion that the earth stood still; how Newton's Principia startled "conventional" science, was denounced for error and not accepted by many for more than a generation; how Harvey's theory of the circulation of the blood met with opposition and ridicule; how Jenner's discovery of vaccination was stormed against both by men of his own profession and by the clergy, and denounced as wicked and unchristian; how when the testator himself began to practice his profession, bleeding was as universal as it was afterwards deemed barbarous;

how the introduction of anæsthetics was considered in some cases to lead to an impious rushing, in a state of unconsciousness, into the presence of one's Maker, and, in others, to defy the curse "In sorrow shalt thou bring forth children;" all this the testator knew, and he lived long enough to witness and study the most remarkable changes of "conventional opinion" which science and medicine had ever known. Would a man of his experience and culture be likely to exclude from a public library the controversial works which upon those subjects alone form a library, and to which a man of science must as surely refer as does a lawyer to the Year-books or the civil law, if he seeks to trace certain doctrines to their source?

On the subject of Government, there is, at this day, absolutely no such thing as "ordinary and conventional opinion." The Grecian school considered that the end of legislation was to make men virtuous, and that such things as education, public defense, internal order, repression of crime, were incidental and of small importance. At the present day, there is still a class which believes in the divine right of kings, and another class which believes, as a virtue, in the assassination of kings; a class which believes in governing by repression and military rule, and another, that "the best government is that which governs least." It is quite certain that, under the plaintiff's contention, the debates of Congress could never find a place in the library.

As to Morality, apart from divine teaching, this has been, since the dawn of history, a relative question. Without referring particularly to the Old Testament, we find at different ages, and among different people of the highest civilization, the widest difference between virtue and vice—morality and immorality.

With the Greeks, as also with the Romans, Charity was unknown. Infanticide among the poor was encouraged. In Sparta, theft, skillfully concealed, was always honorable. Suicide was permitted and often praised, and this even down to the early Christian days. Chastity and the treatment of women have caused the widest differences of opinion and custom. Cruelty, both to men and animals, beginning in its history with the wholesale slaughter of some nations and the slavery of others, and thence involving the history of the treatment of the conquered in war, the history of punishments, the history of national festivals and sports, the history of persecution, the history of the abolition of torture, presents us with examples of practices which were accepted in one age as proper, and repudiated in another as inhuman. What then, can be said to be the "ordinary and conventional opinions" on such a subject? But, knowing the delicacy of parts of it, and lest the range should be too wide, the testator orders that none of the works to be admitted shall "contain ribaldry or indecency."

The plaintiff's contention would exclude from the library the Bible, the Testament, the Koran, the works of Plato, of Seneca, of Socrates, of Herodotus, of Aristotle, of many of the Christian Fathers, and, in a word, the greater part of that literature to which men engaged in working out the problem of modern civilization have recourse.

As to Theology, this has been, of all others, the subject of varying progress. It was imagined by His chosen people that they had reached the climax of all that religion could teach, but the disciples were told, "Except your righteousness shall exceed the righteousness of the Scribes and Pharisees, you shall in no case enter into the kingdom of heaven." Since the day of those teachings, who can say what have been, for any

continuous century, "the ordinary and conventional opinions" on theology, and what standard can be set up by the directors of the library? Shall it still be that of the Jewish faith—of the early Christian faith, with three heresies in the first century, sixteen in the second, till by the time of the fifteenth they counted by hundreds—of the faith of the Romish Church—of the faith of the Reformed Church, and of which of its various sects? Shall they exclude the English prayer-book of to-day, because of the Athanasian creed—or Gibbon's history, because of his fifteenth chapter? Shall they admit those histories of England which tell of "Bloody Mary," or those others which call the same person the "Blessed Mary"? Four hundred years ago the testator, his executor, the directors of the library, the counsel who argued this case, and the judges who decided it would, in the most Catholic country in Europe, have probably been all burned at the stake. What is the case to-day? The leading literature in those countries where thought is free is, on this subject, full of just what the testator desired—"temperate, sincere and intelligent inquiry and discussion." In a single current number of the three prominent English periodicals of the day, contributed to by the first minds in Europe, may be found articles by Cardinal Manning and the Archbishop of Canterbury; by the Abbé Martin and the Dean of Westminster; by Mr. Gladstone and Professor Tyndall; covering the entire range of modern theology, from Papal Infallibility at one end of it, to materialism at the other.

All such works, on all these subjects of Science, Medicine, Government, Morality and Theology, containing "temperate, sincere, intelligent inquiry and discussion" the testator desired should be on the shelves of his library.

"Provided they contain neither ribaldry nor indecency." And yet, according to the plaintiff's interpretation, the directors must exclude a great part of the classical treasures of the present Loganian library, and certainly the works of Plato, Juvenal, Martial, Ovid and Horace; all the Provençal poetry; Shakespeare and certainly his sonnets; Ben Johnson, Milton, Dryden, Rabelais, Cervantes, Voltaire, Dean Swift; nearly all the drama before this century—in a word, the works of all authors who, not sinning against light nor pandering to pruriency, simply wrote according to the light of their day and generation.

Between what, according to the plaintiff's contention, should not be *in*cluded and what must be *ex*cluded from the library, he would bring us to the view of the Caliph Omar when he burnt the Alexandrian library—if the books agreed with the Koran, they were unnecessary; if they differed, they should be destroyed.

Far different was the view of this court, when, a few months ago, in deciding that the Philadelphia Library was, as a "public charity," exempt from taxation, it affirmed the decision of the court below, where it had been said:—

"The educational influence of great libraries has been recognized by all civilized people in all ages. They have been the refuge and preservers of knowledge in the darkest times of ignorance and superstition, the source and rallying point of awakened interest in philosophy and science wherever the human mind has aroused itself to a new search for intellectual light, and the glory and pride of nations, in exact proportion as they have attained a higher plane of enlightened and progressive civilization. It is the concurrent and universal opinion of scholars that no single event in recorded history has been so great a misfortune to the interests of pure learning as the destruction of the Alexandrian Library."

Much stronger than the words of Dr. Rush were those of Mr. Girard as to his college, against which Mr. Webster inveighed so earnestly:—

"There are, however, some restrictions which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said college is made and to be enjoyed."

And among these was that "no ecclesiastic, missionary or minister of any sect whatsoever" should ever be a teacher, or even be admitted within the college as a visitor. The objection that this restriction was contrary to the Christian religion, and therefore void, was thoroughly considered in Vidal *vs.* Girard's Executors, 2 Howard, 128, where it was held that the restriction contained nothing illegal, and the language of the Court on page 198, *et seq.*, foreshadowed Zeissweiss' case, so much relied on by the appellant, and concluded by saying (page 201):—

"It has hitherto been thought sufficient if a testator does not require anything to be taught inconsistent with Christianity."

But even if, granting for the purposes of argument the plaintiff's contention that—

1. The provisions complained of are illegal, and

2. The case is not within the act of 1855,

Yet the result will not benefit him.

There is a clear primary intent to assist what has been held by this Court to be a "*purely public charity*." (Donohugh *vs.* Library Company, 5 Weekly Notes Cas., 196.)

And if one of the directions or conditions of the bequest as to a secondary intent be illegal, it will be stricken out by the Court, leaving the primary intent untouched. To this extent the doctrine of *cy près* has always formed part of the law of Pennsylvania. The appellants, after referring to some anomalous instances of the administration of charities in England, by *sign manual*, say, (page 35) "In Pennsylvania the doctrine of *cy près* has never been favored."

But they have failed to distinguish well, and have confounded the functions of a chancellor, acting ministerially, with his functions, acting judicially.

It is familiar that in England the jurisdiction over charities was two-fold—

1. That which was vested in the crown, and exercised under the sign manual by the chancellor, in a ministerial capacity *ex prorogativâ regis*, and

2. The ordinary jurisdiction of a court of equity upon bill filed.

The exercise by prerogative obviously never formed part of the common law of America.

Perry on Trusts, page 718.

Mann *vs.* Mullin, 3 Norris, 300.

And it is to this head of jurisdiction that the instances cited by the appellants belong. As Mr. Perry says of them, "the cases named are not law in America, and probably nothing like them will ever have a place in its jurisprudence."

Perry on Trusts, *supra.*

But the second head of jurisdiction is of constant occurrence, and includes the present case.

In other words,

"Where property is given to trustees capable of taking, but the property can not be applied precisely in the mode directed, the Court of Chancery interferes and regulates the disposition of such property under its general jurisdiction on the subject of trusts, and not as administering a branch of the prerogative of the king as *parens patriæ*. What is the nearest method of carrying into effect the general intent of the donor must, of course, depend upon the subject-matter, the expressed intent, and the other circumstances of each particular case upon which the Court is to exercise its discretion;"

American Academy *vs.* Harvard College, 12 Gray, 582.

Jackson *vs.* Phillips, 14 Allen, 593.

In Pennsylvania, this doctrine has been clearly recognized, both before the act of 1855;

Witman *vs.* Lex, 17 Serg. and Rawle, 93;

Pickering *vs.* Shotwell, 10 Barr, 27,

And since its passage;

City of Philadelphia *vs.* Girard's Heirs, 9 Wright, 27. And in the latter case it was expressly decided that where a devise to a charity was coupled with "conditions, limitations, powers, trusts (including trusts for accumulation) or other restraints, relative to its use, management or disposal, that are not allowed by law, it is these restraints, and the estates limited on them, that are void and not the principal or vested estate."*

* "And," said the Court, "there is a strong illustration of this rule in many cases wherein a vested legacy was given to an infant with a trust for accumulation until he should arrive at the age of twenty-five, or other over-age period; and it was held that this trust was void for all beyond lawful age, being repugnant to the interest given, and was to be admitted only as directory of the management of the property until the legatee arrived at

Even if the case required the exercise of the prerogative power of a Chancellor, the appellants seem to have

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age, should claim to take and manage it himself. [See Washington's Estate, 25 P. F. Smith, 102; Stillé's Appeal, 4 Weekly Notes Cas., 42.] Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable, but this does not annul the gift.

"The rule of equity on this subject seems to be clear, but when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention.

"And this is the doctrine of *cy près*, so far as it has been expressly adopted by us; not the doctrine grossly revolting to the public sense of justice, and carried to the extravagant length that it was formerly in England, by which an unlawful or entirely indefinite charity was transformed by the court or the crown into one that was lawful and definite, although not at all intended by the donor or testator, but a reasonable doctrine by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided for by the donor fail by reason of their inadequacy or unlawfulness. Our jurisprudence furnishes several illustrations of the doctrine thus restricted. (1 Pa. R., 49; 2 W. & S., 81; 10 Barr, 26; 17 S. & R., 91.)

"The meaning of the doctrine of *cy près*, as received by us, is that when a definite function or duty is to be performed, and it can not be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as much approximation to that scheme as reasonably practicable, and so, of course it must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence.

"But suppose that some of the directions given for the management of the charity are conditions; they are not conditions of the vesting of the principal charity, or in the happening of which the fund is to revert to the donor and his heirs, but upon which a new charity is depending. They would, therefore, on the showing of the claimants here, be void conditions of the new charity, because they may not happen within the time allowed for the vesting of executory devises, and therefore could not divest the already vested charity. Their character is such as to avoid rather the substitutionary charities than the principal and vested ones. Many of the cases already cited show this. It seems to us therefore very clear that the heirs of the testator have shown no fatal defect in the form of this gift."

overlooked the concluding paragraph of the tenth section of the act of 1855 (Purdon 207), by which it appears that such power is now vested in the legislature of this State.

Hence, the result would be, not that the testator's estate would revert to the heir at law, but that, under the direction of the Court, his great charity would be so administered as to retain all that was good, and reject all that was evil.

The appellant's contention seems to involve absurd results. This contention is that the desire of a testator that managers of a library should not exclude books which differ from certain conventional opinions as to religion, avoids the gift, because (putting it in the form of a syllogism)—

1. Such books must contradict conventional opnions;

2. Conventional opinions mean, in this connection, Christianity as taught in the Bible;

3. Therefore, such books are illegal, and the desire that they should not be excluded from the library avoids the gift.

But even admitting the correctness of these steps in the syllogism, yet—

1. It is absurd to say that it is illegal to keep in a public library books which are necessary to the education of theologians. And no one will dispute but that every form of objection to Christianity is the subject of examination and study by theological students.

2. All respectable theological libraries contain all the works whose arguments *against* Christianity are deemed worthy of being considered; and all arguments that can affect rational minds are in that category and so recognized.

3. The appellant's proposition requires this court to assume that office of the Church of Rome which has always been objected to by the Protestant world.

4. It is raising up a standard of morality to be administered by the courts of the State, contrary to a fundamental article of the Constitution, article 1, section 7, which plainly intends that there shall be responsibility for, but no prior prohibition to printing and publishing.

But apart from this, no one will venture to assert that all books disputing the correctness of conventional opinions on religion are necessarily illegal.

And if not illegal, how can the gift be forfeited?

The truth is that the bill inverts the argument. It invokes rules which apply in cases where courts are asked to give their aid to sustain a gift, the result of which is evil. But no aid is now asked by the devisees. They have the legal title, and the court is asked to avoid it, because of the purposes to which it *may* be applied. No authority can be found for the proposition that where the legal title has passed, the estate can be forfeited, because there is a discretionary power to do what is illegal. It is the legal purpose which vitiates, and only to the extent that the property must be so applied.

Girard's case illustrates this. The exclusion of clergymen was a fundamental article. If that meant the education of children in atheism, the scheme as a whole must have failed. If it meant merely a prohibition of certain teachers, the scheme was not affected.

In truth, the argument confounds directions to do or not to do, in merely incidental matters, with directions to found institutions for illegal purposes.

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